

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Yolo
(County File No. 015-ACP-YOL-02-03)

Administrative Docket No. 115

DECISION

**TAD DICKERSON
P.O. Box 446
Knights Landing, California 95645**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CRR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Yolo County Agricultural Commissioner found that the appellant, Tad Dickerson, violated 3 CCR section 6614(b)(3). The commissioner imposed a total penalty of \$401 for the violation.

Tad Dickerson appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

3 CCR Section 6614(b)(3)

Section 6614(b)(3) prohibits a pesticide application being “made or continued when there is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered.”

There is information in the record that Tad Dickerson made an aerial application of Ben-Sul 85 to a tomato field of Kimura & Sons, Inc., on August 14, 2002. The tomato field, site S4, is located on the southeast corner of the intersection of County Road 98 and County Road 25A. During the application, a vehicle was traveling north on County Road 98. There is also information in the record found in the written statement of the driver of the vehicle, stipulations, and the testimony of the appellant at the hearing that the Ben-Sul 85 drifted over County Road 98 and covered the vehicle.

The label information in the record for Ben-Sul 85 states that its active ingredient is sulfur. Under the heading “Hazards to Humans and Domestic Animals,” the label states: “Harmful if absorbed through the skin. Causes eye irritation. Avoid contact with skin, eyes, or clothing.” Under the heading “Physical and Chemical Hazards,” the label further warns: “Sulfur dust suspended ignites easily. Keep away from heat, sparks, or flame.” The “User Safety Recommendations” on the label state: “Wash outside of gloves before removing. As soon as possible, wash thoroughly and change into clean clothing.”

There is information in the record that the laboratory analyses of swab samples taken by the county indicate that 299.4 micrograms of sulfur were present on County Road 98 and that 2.3 micrograms were present on the vehicle. The sample amount on the vehicle was nearly twice the amount taken from a control sample. The record also shows that the swab samples from the road and

the contaminated vehicle were not taken until over 24 hours after the incident occurred.

Tad Dickerson
Docket No. 115
Page Three

It is reasonable to infer that the owner of the vehicle may have attempted to wash the sulfur dust off his vehicle during that period of time. It is also reasonable to infer from the amount of sulfur found on the roadway, that the amount of sulfur on the vehicle immediately after the incident was higher than indicated by the analysis of the swab sample taken from it a day later.

In this case, the normal use of the vehicle was prevented until the vehicle could be cleaned to avoid coming into contact with the sulfur on the exterior when entering or exiting the vehicle. An inference could also be made that there was a likelihood that some of the sulfur could have entered into the ventilation system of the vehicle, its interior, or even its engine or other working parts, increasing the hazard to the driver or other occupants of the vehicle. Until the hazard of contact with the sulfur was removed, the vehicle could not be returned to normal use as a vehicle that was not contaminated by a pesticide that presented a health hazard.

A reasonable inference from the information in the record is that Tad Dickerson's application of Ben-Sul 85 was made when there was a reasonable possibility of contamination of nontarget private property (e.g., the vehicle), including the creation of a health hazard, preventing normal use of the property.

Authority to Levy Fine

FAC section 12999.5 authorizes the commissioner to levy fines for violations of certain State pesticide laws and regulations. Section 12999.5 authorizes a fine up to \$1,000 for each violation.

When levying these fines, however, the commissioner must follow the fine guidelines in the State's pesticide regulations, 3 CCR section 6130. Under section 6130, a minor violation is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is \$50 to \$150 per violation; a moderate violation is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is \$151 to \$400 per violation; and a serious violation is a repeat of a moderate violation or one that created an actual health or environmental hazard, and the fine range is \$401 to \$1,000 per violation.

In this case, the hazard that was created was an actual health or environmental hazard, the exposure of the driver or other occupants of the vehicle to the labeled hazards of the Ben-Sul 85

product as they entered, exited, used, or washed the contaminated vehicle. This determination supports the \$401 fine in the serious range under 3 CCR section 6130.

Tad Dickerson
Docket. No. 115
Page Four

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$401 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

By: original signed by Paul Helliker
Paul Helliker
Director

Dated: original dated August 25, 2003